Supreme Court, U.S.
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No. 97-1173

In the

Supreme Court of the United States

October Term, 1997

TOM BATES, *et al.*,

Petitioners,

v.

BILL JONES, *et al.*,

Respondents.

Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF OF RESPONDENTS PETER F. SCHABARUM AND LEWIS K. UHLER IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether California's legislative term limits violate the First and Fourteenth Amendments by structuring the state Legislature to enhance electoral competition and political opportunity.

2. Whether the First and Fourteenth Amendments guarantee the right to vote for a particular candidate for a particular office, in which the candidate has already had the privilege of serving for six or eight years.

3. Whether California must justify the structural reform of its state Legislature with a compelling state interest.

4. Whether a voters' pamphlet mailed to the current address of every registered voter in the State of California that stated, 11 separate times in italicized, all capital letters, that Proposition 140 included a lifetime ban on service in a particular office constitutes adequate notice of the lifetime ban feature of the initiative.

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STATEMENT OF THE CASE

Against the backdrop of an entrenched politician class and attendant political corruption, the people of California approved Proposition 140 on November 6, 1990, amending the California Constitution. The initiative implemented structural reforms to state government, particularly the state Legislature, mandating a cut in the Legislature's budget (Cal. Const. art. IV, § 7.5), terminating the legislative pension plan (Cal. Const. art. IV, § 4.5), and imposing term limits (Cal. Const. art. IV, § 2(a)). It limits the terms of members of the Assembly to three two-year terms and members of the Senate to two four-year terms. Cal. Const. art. IV, § 2(a).[1]

These reforms were not enacted in a vacuum. For the two decades prior to the passage of Proposition 140, incumbency had acted as a virtual guarantor for reelection:

Election Years	% of Assembly Incumbents Reelected	% of Senate Incumbents Reelected
1972	94.1	100.0
1974	91.6	84.2
1976	90.6	81.8
1978	87.5	78.7
1980	89.7	94.1
1982	93.2	80.0
1984	98.7	94.4
1986	100.0	100.0
1988	94.8	100.0
1990	93.1	94.4
1992	96.2	100.0
1994	88.0	87.5

[1] Statewide officers similarly are limited to two four-year terms, art. V, § 2 (Governor), § 11 (other statewide offices), as are members of the State Board of Equalization, art. XIII, § 17.

Clerk's Record (CR) 130 (Def. Exh. 69), Table 5. The state Legislature was also the scene of scandal. In the 1980s, the Federal Bureau of Investigation conducted a wide-ranging sting operation designed to net corrupt California state politicians. The sting operation, nicknamed "Shrimpscam" for the bogus special interest bill to finance a shrimp-processing plant that was the focus of vote-selling, revealed corruption endemic in the state Legislature. Former Senator Alan Robbins, a 19-year veteran of the Legislature, resigned on November 19, 1991, after 3 years of investigations. In his letter of resignation, Robbins made the connection between his longtime service in a powerful position and his ultimate downfall:

> Over a period of years, as I drank the heady wine of power and influence, my priorities in office became distorted. Success and recognition were foremost; honesty and adherence to the law were not at the center of my focus. Like some others before me, I placed undue emphasis on raising funds, on achieving political status and on impressing my friends.

Associated Press, *Text of Robbins' Letter of Resignation from Senate*, L.A. Times, Nov. 20, 1991, at A23. The Shrimpscam scandal resulted in prison sentences for several former longtime politicians: Senators Joseph Montoya, Alan Robbins, and Paul Carpenter and former Assemblymembers Pat Nolan and Frank Hill. Reporter's Transcript (RT) at 3-403-04. In the wake of these scandals, and in an attempt to end perpetual incumbency, the people of the State of California adopted Proposition 140.

Immediately after Proposition 140's passage, the Legislature, several individual legislators, voters, and special interest groups such as the California Teachers' Association, petitioned the California Supreme Court to strike down

the reforms as unconstitutional.[2] Exercising its original jurisdiction over the writ proceeding, the California Supreme Court upheld term limits on legislators and state officers as fully constitutional under both the state and federal constitutions. *Legislature v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. 919 (1992). The court also upheld the budget reduction and the elimination of the pension plan (except to the extent it applied to legislators first elected before 1990 who continued to serve after 1990). This Court declined to review the California court's ruling. *Legislature v. Eu*, 503 U.S. 919.

Term limits thereafter became an integral part of California's political landscape. In 1994, David Roberti, the former President Pro Tempore of the Senate, was the first legislator to be termed out. RT at 2-362. Several others, anticipating the ends of their political careers in a particular house of the Legislature, voluntarily resigned from their seats either to run for a different office, to continue to serve the public in appointive office, to return to the private sector, or simply to retire. CR 130. Since 1990, through the 1996 elections, 16 state legislators sought election to Congress, 17 sought statewide office, 34 Assemblymembers sought election to the state Senate and 1 state Senator sought election to the Assembly. CR 130 (Def. Exh. 69).

Notwithstanding the judgment of the California Supreme Court, Assemblyman Tom Bates and several of his supporters launched a second court challenge to California's term limits on July 20, 1995, by suing Secretary of State Bill Jones and Alameda County Registrar Bradley Clark in the United States District Court for the Northern District of California. CR 1. The district court granted leave to intervene to Peter F.

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[2] Petitioner Bates was a member of the Legislature at the time and provided financial support for the litigation. Excerpts of Record 177-79, 184-89.

Schabarum and Lewis K. Uhler, the authors and official proponents of Proposition 140. CR 66. Bates and his supporters asserted two causes of action: First, the voters alleged that, under the First and Fourteenth Amendments to the United States Constitution, they have a right to vote for whomever they please, for as long as they please, and that this right is violated by term limits on state legislators. Bates asserted the alleged corollary right to be a candidate in perpetuity. Second, both groups alleged that term limits violate the Equal Protection Clause of the Fourteenth Amendment because it discriminates against termed-out incumbents and those voters who would choose to support such termed-out incumbents. CR 1.

The district court issued its judgment striking down California's term limits on April 23, 1997. Appendix to Petition for Writ of Certiorari (App.) at 144-45. The decision was on the grounds that voters have a federal constitutional right to vote for whomever they choose, and that term limits discriminate against voters who prefer experienced legislators. App. at 168-71.

Respondents appealed to the Court of Appeals for the Ninth Circuit. The case was heard by a three-judge panel of the court, which rendered its decision on October 7, 1997. App. at 77-129. In a 2-1 decision written by Judge Reinhardt and joined by Judge Fletcher, the majority struck down California's term limits. Unlike the district court opinion, however, the majority did not reach the merits of the case, but rather determined that the voters of California did not understand that California's term limits place a lifetime limit on the number of terms that may be served in a particular office. App. at 127-28. The majority held that this purported misunderstanding violated the Due Process Clause of the Fourteenth Amendment. *Id.* In dissent, Judge Sneed argued that (1) the voters were not misinformed,

(2) that mere ambiguity does not rise to a level of a constitutional violation, and (3) that California's term limits are constitutional under the First and Fourteenth Amendments. App. at 129-43.

The Ninth Circuit *sua sponte* ordered a rehearing *en banc* on November 4, 1997. The *en banc* panel issued its 9-2 decision upholding California's term limits on December 19, 1997.

The majority decision rejected Judge Reinhardt's "notice" theory. It assumed, without deciding, "that a federal court may determine whether a state has given adequate notice to its voters in connection with a statewide initiative ballot measure dealing with term limits on state officers." App. at 7. The court below then held, based on the ballot materials and surrounding context, that "California's notice with regard to Proposition 140 was sufficient." *Id.*

On the merits, the Ninth Circuit held that Proposition 140's impact on the right to vote for the candidate of one's choice or for an incumbent to seek reelection is not severe. App. at 8. Most important to the court's decision was the nondiscriminatory nature of term limits: "Proposition 140 makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender." App. at 9. The court below found this minimal burden to be justified by the state's interests in preventing incumbents from amassing "excessive power which, in turn, may discourage other qualified candidates from running for office or may provide the incumbent with an unfair advantage in winning reelection." *Id.* The court concluded that "term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose." App. at 8. At bottom, whether the people choose to structure their government by limiting the terms of legislators' service

is a policy judgment that the people are entitled to make. App. at 10.

REASONS FOR DENYING THE WRIT

I

THIS COURT HAS ALREADY DENIED A PETITION RAISING THE IDENTICAL CLAIMS RAISED IN BATES' PETITION

In *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 114 S. Ct. 1036, 1037 (1994) (Rehnquist, C.J., in chambers), Chief Justice Rehnquist found the reasonable probability that a petition for a writ of certiorari would be granted could be gauged by the fate of a previous petition raising the same issue: "Our recent denial [of a petition raising the same issue] demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue." *See also South Park Independent School District v. United States*, 453 U.S. 1301, 1304 (1981) (Powell, J., in chambers) (denying stay application because it raised issues "almost identical to those presented three years ago, when the Court voted to deny certiorari"); *Miroyan v. United States*, 439 U.S. 1338, 1339 (1978) (Rehnquist, J., in chambers) ("unless applicants can demonstrate a conflict among the Courts of Appeals of which this Court was unaware at the time of the previous denials of certiorari [in similar cases], or which has developed since then, applicants' petition for certiorari will not command the four votes necessary for the granting of the writ in their case").

In 1992, this Court denied certiorari in *Legislature v. Eu*, 503 U.S. 919. The petition in that case presented the following question for review:

> Whether California's term limits, which bar any legislator who has served more than four years in office from running for that office again for the rest of his or her life, violate the First and Fourteenth Amendment rights of candidates and their supporters.

Legislature v. Eu, Petition for a Writ of Certiorari at i. The first, second, and third questions presented for review in Bates' petition separate the question as to candidates, voters, and the appropriate standard of review, but, considered in the aggregate, mirror the question posed and rejected six years ago. The petitioners in *Eu* similarly raised the issue contained in the fourth question of Bates' petition, complaining about the alleged "ambiguity" of the lifetime limit and about the California Attorney General's assertion before the California Supreme Court that consecutive limits were intended. *Id.* at 19-20 ("Recognizing the First Amendment implications of the measure, the Attorney General argued that it should be interpreted as a ban on consecutive terms rather than the lifetime ban its proponents originally conceived."). To the extent Bates relies on this "ambiguity" to assert a claim based on Judge Reinhardt's "notice" theory underlying the majority decision of the three-judge panel (App. at 77-143), that short-lived decision was clearly erroneous. This Court long ago rejected claims of a due process right to notice in the enactment of legislation. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

Moreover, this Court has held that a First and Fourteenth Amendment challenge to term limits does not even raise a substantial federal question. *Moore v. McCartney*, 425 U.S. 946 (1976). This Court's ruling in *Moore* has the same effect as a summary affirmance. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The four-Justice dissent in *U.S. Term Limits v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 1913 (1995) (Thomas, J., dissenting), cited *Moore* in support of the

proposition that term limit measures have tended to survive First and Fourteenth Amendment review "without difficulty." *Id.* This Court should not reverse this consistent course. Bates' petition--nearly identical to two cases previously rebuffed--should be denied.

II

THERE IS NO CONFLICT TO RESOLVE

A conflict between lower courts is the single most important factor justifying a grant of certiorari. *See, e.g., Braxton v. United States*, 500 U.S. 344, 348 (1991); *Curry v. Baker*, 479 U.S. 1301, 1302 (1986) (Powell, J., in chambers). With its decision upholding term limits on state officials, the Ninth Circuit joined every other court to address the constitutionality of state and local term limits under the First and Fourteenth Amendments. Each of these lower courts applied the test established by this Court in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), requiring a balancing of (1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justification for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiff's rights. Moreover, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Id.* at 788.

The Ninth Circuit decision is in accord with decisions of the First and Sixth Circuits. In *League of Women Voters v. Diamond*, 82 F.3d 546 (1st Cir.), *aff'g*, 923 F. Supp. 266 (D. Me. 1996), the First Circuit affirmed a district court opinion holding that term limits

> cannot fairly be characterized as content based. . . . It does not distinguish between or select among the range of ideas and political discourse from which voters can choose. The Act simply amounts to a flat ban, applicable to every incumbent.

. . . .

> . . . [It] makes no distinctions among candidates on the basis of wealth, party affiliation, race, or ideas. It is simply a content neutral ban on every candidate from exceeding a certain number of consecutive terms.

Diamond, 923 F. Supp. at 270. The court also found no significant burden on voters because incumbents could run for other offices and because voters do not have a constitutional right to vote for the specific candidate of their choice. The Sixth Circuit similarly affirmed the district court opinion in *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816 (S.D. Ohio 1993), *aff'd*, 45 F.3d 126 (6th Cir. 1995), holding that term limits are not discriminatory because they do not "create an invidious class distinction." *Id.* at 822. Moreover, *Miyazawa* found "incumbency reform . . . [and] the integrity of the election process" to be compelling interests justifying term limits. *Id.*

Several state high courts have similarly upheld term limits against First and Fourteenth Amendment challenges. The California Supreme Court in *Legislature v. Eu*, 54 Cal. 3d 492, held:

> [T]he state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control.

Eu, 54 Cal. 3d at 520. The court even upheld the lifetime ban on holding state office after a certain number of terms as narrowly tailored, holding:

> Realistically, only a lifetime ban could protect against various kinds of continued exploitation of the "advantages of incumbency" captured through past terms in office. The remainder of petitioners' suggested "alternatives" essentially involve narrow changes in the system of providing contributions or compensation for legislators, changes that would afford "career politicians" with independent resources little incentive to voluntarily terminate public service.

Eu, 54 Cal. 3d at 524.

Eu relied in part on *State ex rel. Maloney v. McCartney*, 159 W. Va. 513, 223 S.E.2d 607, *appeal dismissed sub nom., Moore v. McCartney*, 425 U.S. 927 (1976), in which the West Virginia Supreme Court upheld a two-term consecutive limitation on the Governor. The West Virginia court specifically rejected the claim that the law was undemocratic.

> The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body poltic is enhanced by limitations on continuous tenure.
>
> . . . .
>
> The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls raise fears of an entrenched political machine which could effectively foreclose access to the political process.
>
> . . . .
>
> . . . [I]t has long been felt that a limitation upon succession of incumbents removes the temptation to

> prostitute the government to the perpetuation of a particular administration. . . . While elections are won by 51% of the vote, all of the people of a state must be served. Meretricious policies which sacrifice the well-being of the economic, social, racial, or geographical minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine.

Id. at 611-12 (citations omitted).

Eu identified three mitigating factors to the lifetime limit. The record created in the district court below demonstrates that these mitigating factors are working as intended in real life. The first mitigating factor is that "the affected incumbent is not barred from seeking any other public office, including a seat in another legislative house or a statewide constitutional office. A former Senator may seek a seat in the Assembly, and vice versa." *Eu*, 54 Cal. 3d at 518. Evidence produced at trial showed that between 1990 and 1996, 16 state legislators sought election to Congress, 17 sought election to statewide office, 34 Assemblymembers sought election to the Senate, and 1 Senator sought election to the Assembly. CR 130 (Def. Exh. 69). The second mitigating factor is that the term limits still permit legislators to serve a significant period in office. *Eu*, 54 Cal. 3d at 518. This means, implicitly, that legislators have enough time to accomplish legislative goals. The two legislator-plaintiffs in this action who were elected after passage of Proposition 140 demonstrate this point. Barbara Friedman testified that she authored important legislation relating to the treatment given terminal patients, to breast cancer research, and to the protection and support of battered women. RT at 1-41, 54-55. Martha Escutia was instrumental in authoring legislation establishing the Alameda Corridor project and creating centers for women with AIDS. RT at 3-447. The third mitigating factor is that the term

limits were not retroactive. Thus, Bates was able to serve 20 years in the Assembly, 6 of them after the people adopted term limits. RT at 1-168.

Similarly, the Nevada Supreme Court upheld lifetime limits in *Nevada Judges Association v. Lau*, 910 P.2d 898 (1996), a case challenging the judicial term limits initiative approved by Nevadans. The initiative barred permanently any "justice of the supreme court, judge of any other court, or justice of the peace" from serving more than twice on the same court. *Id.* at 900. The Nevada court held that

> the right to vote to fill every public office is not constitutionally protected; when an election is held, citizens have a constitutionally protected right to participate in the election on an equal basis with other citizens in the jurisdiction.

Id. at 901. As the elections were conducted on an equal basis, the court found the initiative did not create a severe burden. *Id.* The Nevada Supreme Court also addressed the state's interests in imposing a lifetime limit on each particular office. The court noted there are substantial differences between politicians and judges, and that people generally desire career judges far more than career politicians. *Id.* at 902. Addressing the harshness of the measure, the court noted that the terms of all district judges expire at the same time every six years, resulting in the replacement of experienced with novice judges all at once and causing serious disruption to the orderly administration of the state's courts. *Id.* at 902. The court further noted that only Nevada has limited its state judges in this manner. *Id.* However, the court ruled the term limits to be constitutional:

> Nevertheless, it is not the function of this court to judge the wisdom of term limits on the judiciary, but rather to determine whether such limits pass constitutional muster. . . . The state can claim an

> interest in broadening the composition of the judiciary, encouraging new candidates to seek judgeships, eliminating unfair incumbent advantages, and discouraging entrenched power bases in the judiciary.

Id. The court further found the lifetime limit to be necessary even when compared to limits on consecutive terms because

> [i]f the exclusion were not permanent, the composition of the judiciary might not change as drastically as proponents of the initiative intend, since some incumbents would return to previous positions once they again became eligible.

Id. Finally, the court held the term limits to be nondiscriminatory. *Id.*

Lifetime limits on state legislative terms were also upheld unanimously in *U.S. Term Limits v. Hill*, 315 Ark. 251, 872 S.W.2d 349 (1994).[3] *Hill* similarly rejected a First and Fourteenth Amendment challenge to an initiative constitutional amendment which imposed the lifetime limits on legislative service. The state limits upheld in *Hill* are identical to California's term limits: three two-year terms in the lower house; two four-year terms in the state Senate. *Id.*, 315 Ark. at 255. The preamble of the initiative identified the state's interests:

> [E]lected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less

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[3] This portion of the Arkansas Supreme Court's decision was not appealed to this Court in *U.S. Term Limits v. Thornton.*

> representative than the system established by the Founding Fathers.

Id. at 271. Relying on the careful reasoning of *Legislature v. Eu*, the Arkansas court concluded that Arkansas'

> state interest . . . is sufficiently rational and even compelling when weighed against the residual burden placed upon the rights and privileges of elected officeholders and those desiring to support them.

Id. at 272.

In *Roth v. Cuervas*, 82 N.Y.2d 791, 624 N.E.2d 689, 604 N.Y.S.2d 551, *aff'g and adopting opinion in* 158 Misc. 2d 238, 603 N.Y.S.2d 962 (1993), the New York Court of Appeals affirmed a state supreme court ruling that summarily rejected a challenge to New York City's proposed charter amendment to limit the terms of certain city officials. First, the court noted that the law neutrally applied to all political parties, so as not to burden the right to vote by restricting the individual voter's choice to only major party candidates. *Id.* at 970. Then, citing *Reynolds v. Sims*, 377 U.S. 533 (1964), the court held that the "proposed local law would in no way violate the constitutional rule of 'one voter, one vote.'" *Id.* The court further held that the right of association is not infringed because "associational rights do not require that any particular individual serve as [a] candidate." Instead, term limits impose no unreasonable burden because "voters will still be able to find, on the ballot, a candidate who most nearly reflects his or her policy preferences on contemporary issues." *Id.* Lastly, the court held that the law did not discriminatorily disenfranchise any identifiable class of voters. *Id.* Other cases upholding term limits include *Maddox v. Fortson*, 172 S.E.2d 595 (Ga. 1970) (consecutive limits on Governor), *Dutmer v. City of San Antonio*, 937 F. Supp. 587 (W.D. Tex. 1996) (lifetime

limit on city council), and *Cawdrey v. Redondo Beach*, 15 Cal. App. 4th 1212, 1228-31 (1993) (same).

These cases upholding term limits run the gamut from limits on consecutive terms to lifetime limits;[4] from executive offices, to state legislative offices, to local city counsels and county supervisors. All have used sound reasoning based on this Court's jurisprudence. Thus, there is no reason to review the Ninth Circuit decision which is in line with all other federal and state courts that have considered the issue.

III

THE IMPORTANT QUESTIONS RAISED BY THIS CASE HAVE ALREADY BEEN ANSWERED BY THIS COURT

A. State Sovereignty Under the Tenth Amendment Permits States to Structure Their Own Governments

Bates claims that his petition presents "the most important political issue of this decade and certainly the most important

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[4] Courts generally do not base their analyses on the distinction between consecutive and lifetime limits because the distinction is of no constitutional importance. Whether term limits are consecutive or lifetime is purely a matter of legislative line drawing. That is, if a state were to permit politicians to serve in a particular office for three terms, but then require a 16-year (four 4-year term) absence from office before they regain eligibility to run, this would be a consecutive term limit. Yet for anyone over a certain age, the 16-year wait could well prevent any possibility of future service. Moreover, the effect on the voters is exactly the same for those elections in which their preferred candidates are ineligible: they cannot vote for them. A court finding constitutional relevance in the difference between consecutive and lifetime limits would place itself in the untenable position of trying to determine how many years between consecutive terms served are constitutional. This type of line drawing must remain in the political, not judicial, realm.

conflict between the Fourteenth and Tenth Amendments that the federal courts have had to resolve since *Baker v. Carr*[, 369 U.S. 186 (1962)]." Petition at 5. Bates thus completely ignores this Court's extensive discussions of states' rights to determine the structure of their own state governments in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982). These cases were decided on fundamental principles present since the Founding. As James Madison wrote in The Federalist Papers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the *internal order*, improvement, and prosperity of the State.

The Federalist No. 45 at 292-93 (C. Rossiter ed. 1961) (emphasis added), *cited in Gregory v. Ashcroft*, 501 U.S. at 458. This Court has noted the many benefits of federalism: greater sensitivity to the diverse needs of society, increased opportunity for citizen involvement in the democratic processes, more innovation and experimentation in government, and greater responsiveness of the state government to its citizenry. *Id.* The stated goals of California's term limits nearly mirror this list and, certainly, as one of the first states to enact term limits for its state legislators, California was at the forefront of innovation and experimentation.

In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874), this Court noted: "All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specifically provided. These governments the

Constitution did not change." Moreover, the states never lost the right to determine the qualifications of their own state officers. *Duncan v. McCall*, 139 U.S. 449, 461 (1891). The people, through their constitution, may "limit themselves in regard to the qualifications of electors and the qualifications of the elected." *Id.* *See generally* Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815 (1994).

"The methods by which the people of [a state] and their representatives have chosen to structure the [State's] electoral system are entitled to substantial deference." *Rodriguez*, 457 U.S. at 8. Moreover, federal courts "should accord weight to the [State] Supreme Court's assessment of the justification and need for particular [electoral] provisions." *Id.* In *Rodgriguez*, this Court upheld Puerto Rico's system for appointments to legislative vacancies, holding that the "statute at issue here does not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise." *Id.* at 10. The Court concluded: "Absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its 'special concerns and political circumstances.'" *Id.* at 13-14.

In *Gregory v. Ashcroft*, 501 U.S. at 455, this Court analyzed state power and officeholders in the context of both a federal statute and the Equal Protection Clause. At issue was a Missouri statute which required judges to retire at age 70. Justice O'Connor, writing for the Court, stated why federalism was so invaluable. She quoted, "'[w]e beg[i]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.'" *Id.* at 457 (citation omitted). The holding in *Gregory* controls the issue in

this case: states are entitled to determine the qualifications of elected state officials. This Court noted that a qualification issue "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as sovereign." *Gregory*, 501 U.S. at 460 (citing *Taylor v. Beckham*, 178 U.S. 548, 570-71 (1900), *Boyd v. State of Nebraska ex rel., Thayer*, 143 U.S. 135, 161 (1892) ("Each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.")).

The ruling in *Gregory* did not break any new ground. The fact that states have the power to determine the qualifications of their own state officers runs consistently through this Court's jurisprudence. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) ("according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure"); *Pope v. Williams*, 193 U.S. 621, 632-33 (1904) ("the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals"). As this Court held in *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973),

> "this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective and important nonelective executive, *legislative*, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."

Cited in Gregory, 501 U.S. at 462 (emphasis added).

The ultimate holding of *Gregory* is crystal clear: States have the authority to determine the qualifications of their "most important government officials. It is an authority that lies at '"the heart of representative government."' It is a power reserved to the States under the Tenth Amendment and guaranteed to them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.'" *Id.* at 463 (footnotes omitted).

By following *Gregory* and *Rodriguez*, the Ninth Circuit appropriately deferred to the sovereign decisions of the people of California and the California Supreme Court regarding the appropriateness and necessity of limiting the terms of state legislators. Term limits, as a qualification on officeholding (*Thornton*, 115 S. Ct. at 1871), fits squarely within the *Gregory* holding.

B. Term Limits Do Not Impose Any Burden on the Right to Vote Because There Is No Right to Vote for an Unqualified Candidate

This Court has consistently held that voters have no fundamental right to vote for a particular candidate; nor do candidates have a fundamental right to run for a particular office. *Bullock v. Carter*, 405 U.S. 134, 142-44 (1972); *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Combining concerns presented by the Equal Protection cases to the qualification of state officials, this Court noted that "while the Equal Protection Clause provides a check on [] state authority, 'our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.'" *Gregory*, 501 U.S. at 462 (*citing Sugarman v. Dougall*, 413 U.S. at 648). This Court emphasized that "[t]his rule 'is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as

the qualifications of an appropriately designated class of public office holders.'" *Id.*

This Court has flatly held that, because every election law invariably imposes some burden upon voting and associational rights of individual voters, such burdens need not be subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 432-33 (1992). This is true whether the regulations "'govern the registration and qualifications of voters, the selection and *eligibility* of candidates, or the voting process itself.'" *Id.* at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. at 788 (emphasis added)). This holding makes perfect sense because any less deference to state election or candidacy requirements would invalidate innumerable regulations across the nation. Any other holding would also ignore the realities of voting in America and the states. As a factual matter, voters' choices in elections are constrained by myriad candidacy requirements, ranging from prohibitions on felons serving in office (*Richardson v. Ramirez*, 418 U.S. 24 (1974)) to durational residency requirements (*Sununu v. Stark*, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd mem.* 420 U.S. 958 (1975)). Relying on these cases, the Ninth Circuit held in this case, "term limits on state officeholders is a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose." App. at 8.

In this case, any supposed injury to the right to vote is blunted by a few key facts admitted by the plaintiffs in this case. First, *not one* of Mr. Bates' supporters in this lawsuit was willing to declare, under oath, that they would absolutely vote for him in a competitive race.[5] CR 131 (Pl. Exh. 80-82, 85-86); RT at 1-17, 134, 142, 164. Uniformly, they said it would depend on who else was running. *Id.* The irony is, of course, that with Bates on the ballot, it was highly unlikely that anyone would challenge him. Moreover, each of the voters voted in the 1996

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[5] Jonathan Browning, a member of the Green Party, could not have voted for Bates in the Democratic primary. CR 131 (Def. Exh. 80).

primary and stated their intention to vote in the 1996 general election. CR 130 (Def. Exh. 71). Thus, the voters in this lawsuit have every bit as much of a right to vote as any other citizen in the State of California. No law prevents them from walking into their precinct polls on election day and choosing from among the qualified candidates. Tom Bates and his supporters seem to think they have an affirmative right to force the state to place an individual on the ballot who cannot serve. No such right exists under the federal Constitution.

Every election regulation affects the result. Even a regulation that requires candidates to be registered voters discriminates against the category of people who have not chosen to register. California's term limits are a classic example of a constitutional amendment enacted not with the purpose of affecting the result of any particular election, but of resetting and reestablishing the rules of the game. As the Ninth Circuit held, California's term limits affect all officeholders equally--regardless of race, gender, age, political viewpoint, or any other possible classifications. App. at 9. Because this holding is consistent with this Court's jurisprudence and all other courts to consider the issue, it does not raise any unsettled questions requiring resolution by this Court.

CONCLUSION

Using the necessarily blunt weapon of the citizen initiative, the people of California modified their earlier decision to professionalize the state Legislature. In so doing, the people believed that term limits will further the goals of increased electoral competition and political opportunity, thus resulting in greater accountability. The California Supreme Court, when it upheld the constitutional validity of California's

term limits, suggested that if the experiment does not work out to the people's satisfaction, they could propose yet another initiative to reverse course. *Legislature v. Eu*, 54 Cal. 3d at 512. In seven years, during which time the membership of the entire California Assembly, and most of the membership of the California Senate, has been termed-out, there has been no movement to amend the state constitution to eliminate term limits. The only movement to alter the scope of term limits has been by dethroned legislators. The people, however, seem quite content with the changes term limits have wrought.

This Court should deny the petition for writ of certiorari.

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Respectfully submitted,

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